IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

No. 306

LILLIAN AGNES WIELAND and CHARLES L. WIELAND,
Petitioners,

against

C. A. SWANSON & SONS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Preliminary Statement.

Petitioners, husband and wife, commenced this action in negligence to recover damages for personal injuries, allegedly sustained by the wife in eating part of the contents of a can of "Swanson Chicken Fricassee" which, it is asserted, contained a bone.

Suit was started against the retail grocery company which sold the product as well as against the manufacturer who prepared and packed it. The case was first tried before Judge Leibell and a jury, at which trial final judgment was entered against petitioners and in favor of the retail grocery company, but the jury was unable to reach a verdict as to

the manufacturer, C. A. Swanson and Sons, the respondent. No appeal was ever taken from this judgment.

By reason of the jury disagreement, a second trial was had as to the claim which remained undetermined. This trial was held before Judge Clancy and a jury, and, at its conclusion, a jury verdict was again entered against the petitioners and this time in favor of respondent, C. A. Swanson and Sons.

From the judgment entered upon this jury verdict, petitioners appealed to the United States Court of Appeals for the Second Circuit. That court rendered a judgment of affirmance on June 1, 1955, the opinion of the court being reported in 223 F. 2d 26. A petition for rehearing was denied on June 23, 1955.

It is petitioners' present claim that the opinion and judgment rendered by the United States Court of Appeals for the Second Circuit is erroneous, contrary to the law and the evidence, and prejudicial to the interests of petitioners and the general food-consuming public, and that the judgment should be reversed by this court.

The Events of the Accident.

On October 24, 1949, petitioner Lillian Wieland, having previously purchased a can of appellee's chicken fricassee, opened the can to serve lunch for herself and her daughter.

She had eaten this product before and was well aware of the fact that it contained bones and was intended to contain them.

Mrs. Wieland dumped the contents from such can into an aluminum pot and heated it. She described what then happened as follows:

> "I took it out of the aluminum pot with a large soup spoon. I put it on the two plates in equal por-

tions. I took a small piece of white meat on my fork, put it in my mouth, took one bite and choked" (97, Cf. 144; 148-149).

Later medical examination showed that in the "upper portion of the left side of the esophagus * * * there was a longitudinal tear about 3 centimeters long, gaping about 1 centimeter".

No foreign body or substance was ever observed in the throat.

I.

Petitioners have failed to show any reason for the exercise of the court's discretion to grant a writ of certiorari in this case.

Rule 19 of the Revised Rules of the Supreme Court of the United States sets forth the character of reasons which will be considered by the court in determining whether or not the court's discretion to grant a writ should be exercised.

It is respectfully submitted that the instant case does not come within any of the categories suggested or set forth in Subdivision 1(a) and (b) of the Rule.

The case is a simple one. The decision of the Court of Appeals for the Second Circuit does not involve any unique situation, but is one of elementary law holding in substance that petitioners have failed to carry the burden of proof—irrespective of any question of legal liability.

All of the matters set forth as specifications of error were passed upon by the Court of Appeals either by way of original appeal or by way of petition for rehearing.

II.

Petitioners have failed to show any error in the Court of Appeals for the Second Circuit or in the District Court.

Judge Hastie in his opinion has taken the position, and rightly so, that there is no problem presented on this record which requires any inquiry into the extent of a manufacturer's liability in New Jersey for foreign substances in food, nor does it require any inquiry as to a processor's liability for injury caused by a splintered chicken bone in fricassee. Judge Hastie correctly concluded that the issue here is a fact question distinct from any dispute as to the extent of liability.

The product involved was Chicken Fricassee which contained bones, was intended to contain them, and which petitioner knew contained them. Under these circumstances, it is clear that there can be no recovery if the injury was caused by a whole chicken bone and the Court of Appeals has so held. This is no more than common sense. There are innumerable foods which, whether procured or consumed in commercial packages or in natural condition, contain inedible portions which may become a source of injury or danger if swallowed. Among such foods containing possible dangerous components can be listed fish, meat, crab, lobster, oysters, clams, shrimp, fruits and nuts. Any of these can cause injury if hard and sharp components of these foods are casually consumed. It is obvious that a seller or producer of such foods will not be held responsible for resulting injury upon a mere showing that such a product contained an inedible element which was bitten or swallowed with consequent personal injury

It would not only be contrary to all authorities but would do violence to common sense to hold the food industry responsible for injury which results from the eating of food offered in its normal, expected and intended condition. Such a holding would all but end the sales of processed meats, fish, fowl, etc.

On both trials of the action petitioners asserted that the injury to Mrs. Wieland was caused by a *splintered* bone. They thus sought to distinguish the instant case on the ground that the natural and expected bone in the fricassee was shattered or splintered and that this called for a different rule.

The trial court charged the jury that if it found that the injury was caused by a chicken bone, plaintiffs could not recover. Petitioners assert this charge is in error since it precluded any recovery for injury caused by a splintered fragment of bone.

The answer to this claim is clear and unequivocal. The record contains not one scintilla of proof that the bone swallowed by Mrs. Wieland was splintered. No evidence will be found in the record from which it can be inferred that the bone swallowed was other than in its normal and natural state and condition. No doctor said that the bone swallowed was splintered or broken. No doctor said that the injury sustained could have resulted only from a splintered or broken bone. No doctor said that the injury could not have resulted from the ingestion of an unbroken, whole bone. No doctor or other witness said when or how the bone was broken. No one ever saw or recovered the material or object upon which Mrs. Wieland choked.

In the face of such a record there is no room to reach a determination that the bone involved in the case was broken. To ask a jury on this record to arrive at a con-

clusion that the bone was broken and then conclude that it was broken by reason of respondent's negligence would be to invite a verdict based upon supposition arrived at by guess and surmise. This failure of proof was recognized by Judge Hastie and the court, and he notes that the doctors' testimony "points to no greater probability that the injury was caused by a splintered fragment of bone than by a whole bone or some other object." He then states "it would have been mere speculation, and therefore improper, for the jury to have concluded that a splintered bone caused the injury. The party who bears the burden of proof is not entitled to submit alternative possibilities to a jury for speculative choice among them when the record supplies no evidentiary basis for choice by logical inference."

Even if, however, it were established that the bone was splintered recovery should be denied. The courts of California, Illinois, Iowa and Georgia have all passed on instances involving broken, splintered or shattered fragments of bone and have uniformly denied recovery, refusing to make any distinction in law based on whether or not the bone involved was whole or broken. (*Mix* v. *Ingersoll,* 59 P. 2d 144; *Silva* v. *Woolworth,* 83 P. 2d 76; *Brown* v. *Nebiker,* 296 N. W. 366; *Goodwin* v. *Country Club,* 323 Ill. App. 1, 54 N. E. 2d 612; *Norris* v. *Pig'n Whistle,* 76 Ga. App. 369, 53 S. E. 2d 718; *Lamb* v. *Hill,* 245 P. 2d 316). It should also be noted that unlike the instant case, none of these cases involved products in which bone was an intended component.

Petitioners have cited *Wood* v. *Waldorf System,* 83 A. 2d 90, which involved the presence of a chicken bone in a bowl of chicken soup. The case is readily distinguishable on the basis of the court's own statement in its decision pointing out that a distinction should be made as to whether the presence of such a substance as a chicken bone is

naturally and ordinarily expected to be in the final liquid product. In the instant case it was expected by everyone and conceded by everyone that bones would naturally be in the final product. The same conclusion is to be drawn from the other cases cited by petitioners, namely *Bonenberger* v. *Pittsburgh Merc. Co.*, 345 Pa. 559, 28 A. 2d 913 and *Roseberry* v. *Wachter*, 33 Del. 253, 138 Atl. 273.

Petitioners, faced with this decision and the record, urged, for the first time on petition for rehearing, a third alternative, i.e., that the jury should have been permitted to find that the injury was caused by "a small, regular, hard sharp bone" not expected to be found in the product. This claim, now urged for a second time in this petition, but never raised in the trial court, is apparently an afterthought and was asserted in an effort to get around the opinion of the Court of Appeals and show that the District Court's charge was in error. However, petitioners have done no more than to throw in a third alternative to the jury for speculative choice. They would thus ask that a jury be permitted to determine:

1. Was it a bone?
2. Was it a splintered bone?
3. Was it some foreign substance?
4. Was it a bone of a particular size?
5. Was a bone of this size to be expected in the product?

and then to determine negligence, if any.

What the petitioners in essence are claiming in this petition is simply that there should be absolute liability. The fact of the accident and the injuries themselves should permit the jury to infer that the respondent was negli-

gent. It is apparently petitioner's belief that they have only to prove the fact of injury and accident and nothing more. This is, in effect, what they say when they state on page 10 of the petition:

> "It has always been the contention of the petitioners that they were not under obligation to elect whether the object that caused the injury was a splintered bone, a small, regular, sharp, hard bone, or any other foreign substance not reasonably expected to have been found in the small unattached piece of white meat, less than one inch in diameter, which was testified to by the plaintiff as having been ingested, but that they were entitled to present the facts just as they happened, and the conclusions of the doctors, and that then it was the proper function of the jury to logically infer from the proven fact want of due care and say whether the injury was caused by bone or metal or neither."

This view, however, completely overlooks the fact the allegedly harmful element was a natural and normal constituent and component of the food purchased. Had all bone been absent, the food would not have been chicken fricassee as labelled, but something else. The presence of bone was not something the manufacturer was bound to exclude, but rather was something it was bound to include. The bone was not alien or foreign to the product sold and its presence did not suggest or bespeak negligence. It was an intended part of the purchased product and petitioners were aware of this fact. It is submitted that without exception all of the food cases cited on pp. 13-15 in the Petition are removed from the issues here since all involve foreign substances, i.e. glass, tacks, nails, bacteria, etc.

All the petitioners have shown on the basis of the record is that Mrs. Wieland swallowed an unidentified body, pre-

sumably a chicken bone, and that she cut her throat. If, in the presence of such sketchy facts, a food producer is to be subjected to the speculative whim of a jury, then the industry has become an absolute insurer against accidents in the course of consumption. Such a result is not sanctioned by the law of New Jersey, nor the law of any other jurisdiction, nor is it a rule that can be accepted as just or desirable.

The Court of Appeals and the District Court are without error.

III.

The conduct of the Trial Court was not prejudicial to petitioners.

Petitioners have contended that the jury was confused by the rulings of the trial court and cites as example f. 480 and ff. 488-89. However, it is impossible to see how this could have confused the jury since the jury was not present when these exchanges between court and counsel concerning the theory of the judge's charge took place.

It may be true that petitioners' counsel was distressed by the ruling of the court made at the close of trial (f. 488) and in the charge (536) to the effect that petitioners could not recover if the object which caused the injury was a chicken bone. That ruling, however, was not made until petitioners' case was concluded and did not affect the course or content of petitioners' proof. As pointed out by Judge Hastie in his opinion "• • • counsel did not indicate then and has not indicated since that he had any additional evidence to show the presence of a non-bone foreign body."

IV.

The Petition Should Be Denied.

Respectfully submitted,

BREED, ABBOTT & MORGAN,
Attorneys for Respondent.

SUMNER FORD,
J. CHRISTOPHER MEYER, JR.,
THOMAS W. KELLY,
Of Counsel.